No. 94-367

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

GEORGE W. HEINTZ and BOWMAN, HEINTZ, BOSCIA & McPHEE,

Petitioners,

v.

DARLENE JENKINS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Is an attorney engaged solely to prosecute litigation against a consumer a "debt collector" within the meaning of the Fair Debt Collection Practices Act (15 U.S.C. §1692a(6))?

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To the Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent Darlene Jenkins prays that the Court decline to issue a writ of certiorari in this case.

REASON FOR DENYING THE WRIT

Reluctantly, Respondents are forced to agree with Petitioners that the Sixth Circuit decision in *Green v. Hocking*, 9 F.3d 18 (6th Cir. 1993), has created a conflict among the Circuit Courts as to whether an attorney engaged solely to prosecute litigation against a consumer can ever be considered a "debt collector" within the meaning of the Fair Debt Collection Practices Act (15 U.S.C. §1692a(6)) ("FDCPA"). However, because the Seventh Circuit's interpretation of the FDCPA, as amended in 1986, is clearly correct for a number of reasons, this Court should not grant certiorari.

The plain language of the statute conclusively supports the Seventh Circuit's reasoning. The FDCPA applies to "any person who . . . regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. §1692a(6). This language, when combined with Congress' 1986 removal of the blanket attorney exception of §1692a(6)(F), makes it clear that attorneys who fit the statutory definition, because they "regularly" engage in debt collection, come under the auspices of the Act. As the Ninth Circuit recently stated, "There is simply no mention of attorneys in the current definition of 'debt collector' or its exceptions; nor is there any distinction drawn between legal and non-legal activities. Nothing currently in the text of the FDCPA hints at the conspicuous solicitude for the legal profession the [Petitioners] propose[ ]." *Fox v. Citicorp Credit Services, Inc.*, 15 F.2d 1507, 1512 (9th Cir. 1994).

In addition, as the Ninth Circuit's opinion in *Fox* also points out, Petitioners' reliance on the legislative history of the FDCPA is misplaced. There is no "clearly-expressed intention necessary to overcome the strong pre-

sumption that Congress expresses its intent through the language it chooses.' " *Id.* at 1512 (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987)). Even were the language of the FDCPA not clear, Petitioners base their argument regarding the intent of Congress on a single statement by Representative Annunzio, not even to the House of Representatives, which occurred subsequent to the passage of a bill. The remarks by Rep. Annunzio were inserted in the Congressional Record pursuant to "orders". (*See attachment*) The probative value of that claim is further undermined by the House Report, which states "that attorneys in the business of collecting debts be subject to all provision of the Act, if they meet the definition of debt collector." *Fox*, 15 F.3d at 1513 (quoting House Report 405, at 3, 1986 U.S.C.A.A.N. at 1754).

There is one final reason to deny certiorari. If Respondent proves her allegations, the conduct complained about by her – the deliberate attempt to pass on to Respondent the cost of a financial protection policy bought to insure against default – is clearly illegal. Although Petitioners argue that placing litigation activities under the rubric of the FDCPA may have absurd results in the future, granting Petitioners the exemption they seek would have the effect of producing an anomalous result now.

Simply put, four of five Circuits that have decided this issue in the last three years have unequivocally stated that there is nothing in the FDCPA that would allow for the broad exemption which Petitioner seek. *Accord, Shapiro & Meinhold v. Zartman*, 823 P.2d 120 (Colo. 1992). The one divergent opinion did so on the grounds that such a result "would produce absurd outcomes." *Green*, 9 F.3d at 21. Whether certain provisions of the

FDCPA, on which the Sixth Circuit focused, might properly be construed not to apply to attorneys conducting litigation is not the issue before the court. The only question is whether all attorneys are wholly exempt for any act involving litigation when there is not a word to this effect in the statute. As this Court has previously observed, "Judicial perception that a particular result would be unreasonable may enter into the construction of ambiguous provisions, but cannot justify disregard of what Congress has plainly and intentionally provided." *Commissioner v. Asphalt Products Co., Inc.*, 482 U.S. 117, 121 (1987). Since the language of the FDCPA is clear, the Seventh Circuit opinion below was correct. Respondent respectfully asks this Court to deny certiorari.

Respectfully submitted,

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APPENDIX A

LEVEL 1 – 18 OF 25 ITEMS

Congressional Record – House

Tuesday, October 14, 1986

99th Cong. 2d Sess.

132 Cong Rec H 10031

REFERENCE: Vol. 132 No. 141 – Part 2

TITLE: ATTORNEYS AND THE FAIR DEBT COLLECTION PRACTICES ACT

SPEAKER: MR. ANNUNZIO

TEXT:

Text that appears in UPPER CASE identifies statements or insertions which are not spoken by a Member of the House on the floor.

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The SPEAKER pro tempore. Under a previous order of the House, the gentleman from Illinois [Mr. Annunzip] is recognized for 5 minutes.

MR. ANNUNZIO. MR. SPEAKER, ON JULY 9, LEGISLATION REPEALING THE ATTORNEY EXEMPTION TO THE FAIR DEBT COLLECTION PRACTICES ACT BECAME LAW. THAT LEGISLATION, WHICH I INTRODUCED, REQUIRES THAT ATTORNEYS IN THE DEBT COLLECTION BUSINESS COMPLY WITH THE LAW THAT PROTECTS CONSUMERS AGAINST ABUSIVE, DECEPTIVE, AND UNFAIR

DEBT COLLECTION PRACTICES. THE LEGISLATION WAS A DIRECT RESPONSE TO THE EXPLOSIVE GROWTH IN THE NUMBER OF LAW FIRMS THAT HAD ENTERED THE DEBT COLLECTION BUSINESS AND WERE ABUSING THE EXEMPTION THE ORIGINAL FAIR DEBT COLLECTION PRACTICES ACT PROVIDED. WITH THE REPEAL OF THE EXEMPTION, ATTORNEYS IN THE DEBT COLLECTION BUSINESS MUST COMPLY WITH THE ACT WHEN THEY COLLECT CONSUMER DEBTS.

THE PROLIFERATION OF ATTORNEY COLLECTORS HAS GROWN DRAMATICALLY OVER THE PAST SEVERAL YEARS, AND AN ESTIMATED 5,000 ATTORNEYS ARE NOW INVOLVED IN DEBT COLLECTION. REPEAL OF THE EXEMPTION WAS INTENDED TO PLACE ATTORNEY COLLECTORS AND LAY COLLECTORS ON AN EQUAL FOOTING. IT ENSURES THAT ATTORNEYS USE FAIR DEBT COLLECTION TACTICS. IT ENSURES THAT LAY COLLECTORS, WHO ARE REQUIRED BY THE ACT TO REFRAIN FROM USING ABUSIVE TACTICS, ARE NOT COMPETITIVELY DISADVANTAGED BY THE ACT.

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ETHICAL ATTORNEYS NEED HAVE NO CONCERNS ABOUT THE IMPACT OF THE ACT ON THEIR PRACTICE. THE FAIR DEBT COLLECTION PRACTICES ACT REGULATES DEBT COLLECTION, NOT THE PRACTICE OF LAW. CONGRESS REPEALED THE ATTORNEY EXEMPTION TO THE ACT, NOT BECAUSE OF ATTORNEY'S CONDUCT IN THE

COURTROOM, BUT BECAUSE OF THEIR CONDUCT IN THE BACKROOM. ONLY COLLECTION ACTIVITIES, NOT LEGAL ACTIVITIES, ARE COVERED BY THE ACT.

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SOME ATTORNEYS HAVE CLAIMED THAT THE ACT WILL RESTRICT THEIR ABILITY TO PRACTICE LAW. NOTHING COULD BE FURTHER FROM THE TRUTH. THE ACT APPLIES TO ATTORNEYS WHEN THEY ARE COLLECTING DEBTS, NOT WHEN THEY ARE PERFORMING TASKS OF A LEGAL NATURE.

SUGGESTIONS THAT THE REPEAL OF THE ATTORNEY EXEMPTION PROHIBITS BRINGING LEGAL ACTION IS AN ABSURD READING OF THE ACT. THE ACT ONLY REGULATES THE CONDUCT OF DEBT COLLECTORS, IT DOES NOT PREVENT CREDITORS, THROUGH THEIR ATTORNEYS, FROM PURSUING ANY LEGAL REMEDIES AVAILABLE TO THEM.

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ACTIONS WHICH CAN ONLY BE TAKEN BY THOSE POSSESSING A LICENSE TO PRACTICE LAW ARE OUTSIDE THE SCOPE OF THE ACT. THE FILING OF A COMPLAINT IS NOT COVERED BY THE ACT. SINCE IT IS NOT COVERED UNDER THE ACT, THERE IS NO REQUIREMENT THAT ATTORNEYS INCLUDE THE NOTICES REQUIRED UNDER SECTION 809 OF THE ACT IN LEGAL FILINGS. FURTHER, THERE IS NO REQUIREMENT THAT THE ATTORNEY MUST PROVIDE VERIFICATION OF THE DEBT AS REQUIRED UNDER THAT SECTION OF THE ACT IN THE CONTEXT OF LEGAL PROCEEDINGS. SINCE THE ATTORNEY WILL BE REQUIRED TO PROVE THE VALIDITY OF THE DEBT AS AN ELEMENT OF THE LEGAL PROCEEDINGS, THERE IS NO NEED TO REQUIRE ADDITIONAL VALIDATION.

REPEAL OF THE ATTORNEY EXEMPTION DOES NOT INFRINGE UPON THE PRACTICE OF LAW BY ATTORNEYS. IT DOES ASSURE THAT CONSUMERS ARE PROTECTED FROM UNFAIR AND UNETHICAL DEBT COLLECTION PRACTICES, REGARDLESS OF THE PROFESSION OF THE COLLECTOR.